IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6520

KINNEY KINMON LAU,
a Minor by and through
MRS. KAM WAI LAU,
His Guardian ad Litem, *et al.*,

Petitioners,

v.

ALAN H. NICHOLS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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July 25, 1973

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 116) is reported at 475 F.2d 909; a subsequent order of the Court of Appeals for the Ninth Circuit (App. 141, denying the request of a member of the Court of Appeals for *en banc* consideration of the instant case) is not yet reported. The order of the United States District Court for the Northern District of California (Civ. No. C-70-627 LHB, May 26, 1970) is not reported; it is set forth at pp. 113-115 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 8, 1973 (App. 116). On April 9, 1973, within ninety (90) days of the date of entry of judgment of the Court of Appeals, a petition for writ of certiorari was filed. This Court granted the writ on June 11, 1973. 93 S.Ct. 2786 (App. 140). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a school district, when it precludes non-English-speaking children of Chinese ancestry from any opportunity to obtain an education by refusing to provide any instruction that would permit them to comprehend and benefit from classes taught exclusively in the English language, violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Civil Rights Act of 1964.

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of the Civil Rights Act of 1964 (codified in 42 U.S.C. §2000d):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

This case also involves guidelines issued by the United States Department of Health, Education and Welfare [hereinafter referred to as "HEW"] concerning "Identification of Discrimination and Denial of Services on the Basis of National Origin" (35 Fed.Reg. 11595, July 18, 1970) which state, in pertinent part:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

The full guidelines are set forth at pp. 1a-3a of the Appendix attached to the instant Brief.

Section 71 of the California Education Code:

> Language of instruction
>
> English shall be the basic language of instruction in all schools.
>
> The governing board of any school district and any private school may determine when and under

what circumstances instruction may be given bilingually.

It is the policy of the state to insure the mastery of English by all pupils in the schools; provided that bilingual instruction may be offered in those situations when such instruction is educationally advantageous to the pupils. Bilingual instruction is authorized to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.

Pupils who are proficient in English and who, by successful completion of advanced courses in a foreign language or by other means, have become fluent in that language may be instructed in classes conducted in that foreign language.

Section 8573 of the California Education Code:

Requirements for high school graduation and diploma

No pupil shall receive a diploma of graduation from grade 12 who has not completed the course of study and met the standards of proficiency prescribed by the governing board. Standards of proficiency in basic skills shall be such as will enable individual achievement and ability to be ascertained and evaluated. Requirements for graduation shall include:

(a) English.
(b) American history.
(c) American government.
(d) Mathematics.
(e) Science.
(f) Physical education, unless the pupil has been exempted pursuant to the provisions of this code.
(g) Such other courses as may be prescribed.

Section 12101 of the California Education Code:

Children between ages of 6 and 16 years

Each person between the ages of 6 and 16 years not exempted under the provisions of this chapter is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted under the provisions of Chapter 7 (commencing at Section 12551) shall attend the public full-time day school or continuation school or classes for the full time for which the public schools of the city, city and county, or school district in which the pupil lives are in session and each parent, guardian, or other person having control or charge of such pupil shall send the pupil to the public full-time day school or continuation school or classes for the full time for which the public schools of the city, city and county, or school district in which the pupil lives are in session.

STATEMENT OF THE CASE

On March 24, 1970, petitioners – representative of 1,800 other non-English-speaking Chinese students in the San Francisco Unified School District – filed this lawsuit in United States District Court for the Northern District of California. They alleged that they were unable to speak, understand, read, or write English. They were thus completely excluded from receiving the benefits of public school education, in that no instruction was provided which would permit them to comprehend and benefit from all classes offered exclusively in the English language. Petitioners' complaint sought to require the San Francisco Unified School District [hereinafter referred to as "School District"] to provide such instruction so that non-English-speaking Chinese students could have access

to the educational opportunities offered to English-speaking students. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § §1331 and 1343.

Since the educational barriers confronting non-English-speaking Chinese students were–and are–unfortunately clear, all parties stipulated to the essential facts. Pursuant to such stipulation, the District Court found that 2,856 Chinese-speaking students in the School District lacked an understanding of the English language.[1] Of these, the Court found that 1,790 non-English-speaking Chinese students were not provided any instruction that would permit them to comprehend and benefit from their classes taught in the English language.[2]

Moreover, there is also no issue in this case concerning the harms suffered by these non-English-speaking Chinese students. The School District has admitted without reservation that its failure to provide these children with English-language skills results in "their inability to understand the regular [school] work."[3] This, in turn, "inevitably" leads to "poor performance" in – and probable "dropout" from – school.[4]

On May 26, 1970, the District Court issued its order denying petitioners' motions for injunctive and declaratory relief, and finding for the School District on the merits of the case. The Court found that

> These Chinese-speaking students–by receiving the same education made available on the same terms

[1] *Lau v. Nichols*, Order, 2 (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) (App. 113).

[2] *Ibid.*

[3] San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 3A (May 5, 1969), Plaintiffs' Exhibit No. 5 (App. 101).

[4] *Id.* at 6A (App. 103).

and conditions to the other tens of thousands of students in the San Francisco Unified School District–are legally receiving all their rights to an education and to equal educational opportunities.[5]

From this order petitioners appealed to the United States Court of Appeals for the Ninth Circuit. On January 8, 1973, the Court of Appeals for the Ninth Circuit issued its opinion affirming the judgment of the District Court (App. 116). One member of the original Court of Appeals filed a dissenting opinion (App. 131), and the majority decision provoked a request for rehearing *en banc* by a member of the Court of Appeals who was not a member of the original panel (App. 141). Though a rehearing *en banc* was denied (*ibid.*), the denial produced an additional dissent in the Court of Appeals (App. 141).

SUMMARY OF ARGUMENT

A. The right of students to an educational opportunity is not met merely through the illusion of equal treatment. The decisions of this Court consistently reaffirm that education is not just a matter of physical presence in a classroom. *E.g., Brown v. Board of Education,* 347 U.S. 483 (1954). Educational opportunities demand – at a minimum – that students be afforded access to an educational program from which they can benefit. Yet, under the decision of the Court of Appeals below, the Constitutional right to educational opportunity is satisfied merely by a school district providing students "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the

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[5] *Lau v. Nichols,* Order, 3 (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) (App. 114-115).

district." *Lau v. Nichols*, 472 F.2d 909, 916 (9th Cir. 1973). For nearly 1,800 non-English-speaking Chinese students in San Francisco, however, such "equality" results in not only the absence of minimally "adequate education" (*San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1292 (1973)), but total foreclosure from any education. These students are denied any instruction which would permit them to comprehend and benefit from classes taught exclusively in the English language. By sanctioning such exclusion, the court below has implicitly determined that only English-speaking students are entitled to educational opportunities under the Equal Protection Clause.

B. The exclusion of non-English-speaking Chinese students from any educational opportunities stems directly from actions taken by the School District. The pervasive involvement of the School District – an agent of the State in providing education – in the discrimination suffered by these students includes compelling attendance at school (Cal. Ed. Code §12101), mandating English as the basic language of instruction (Cal. Ed. Code §71), and requiring knowledge of English to graduate from high school (Cal. Ed. Code §8573). Thus, for the court below to attribute the plight of these students to "deficiencies created by the appellants themselves in failing to learn the English language" (472 F.2d at 917 (App. 128-129)) is indeed – as the dissenting opinion below stated – "both callous and inaccurate." *Id.* at 922 (App. 138). Regardless of whether the School District caused the petitioners' English-language deficiency in the first place, it must provide non-English-speaking students with access to the benefits of an education. Myriad decisions of this Court firmly recognize that a violation under the Equal Protection Clause may be established where only the manifest effect of a particular action is discriminatory, quite apart from the

government's causation or intention. *E.g., Bullock v. Carter*, 405 U.S. 134 (1972).

C. 1. Non-English-speaking Chinese students are members of a distinct ethnic, national origin group. Moreover, the distinction which triggers the inequalities suffered by them is one which ineluctably originates from their nationality: language. The resulting discrimination – based on a characteristic of national origin which this Court has considered a "suspect class" (*e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971)) – must be subjected to strict judicial scrutiny, with such discrimination being justified only by an overriding substantive interest of the School District. No such interest has been alleged, let alone demonstrated, by the School District in this case.

2. Even under the "rational basis" standard of review, the discriminatory actions of the School District do not satisfy Constitutional standards. For the School District to operate a system of education which arbitrarily and capriciously withholds the tools of comprehension from a large minority of students furthers no legitimate state purpose.

D. Under Section 601 of the Civil Rights Act of 1964, discrimination on the basis of national origin is prohibited "under any program or activity receiving federal financial assistance." 42 U.S.C. §2000d. Pursuant to HEW guidelines issued under this statute, school districts receiving such funds "must take affirmative steps to rectify the language deficiency" of students whose "inability to speak and understand the English language excludes [them] from effective participation in the educational program." 35 Fed.Reg. 11595 (July 18, 1970). Though the School District receives extensive federal financial assistance, it has taken no affirmative steps to rectify the discrimination suffered by non-

English-speaking Chinese students. Such inaction constitutes a patent violation of federal statutory requirements.

ARGUMENT

I

THE SCHOOL DISTRICT'S REFUSAL TO PROVIDE NON-ENGLISH-SPEAKING CHINESE STUDENTS WITH INSTRUCTION THAT WOULD PERMIT THEM TO COMPREHEND AND BENEFIT FROM CLASSES TAUGHT EXCLUSIVELY IN THE ENGLISH LANGUAGE UNCONSTITUTIONALLY FORECLOSES THESE STUDENTS FROM ANY EDUCATIONAL OPPORTUNITY.

During the hearing on this case in the United States District Court, the District Court Judge made the following observation about the non-English-speaking Chinese petitioners:

> [T]hey aren't students at all; they are just people, they are just bodies in the classroom . . . . [T]hey are named as students because it's convenient, but since they are not studying and they are not learning . . . you can't call them students.[6]

Unfortunately, the decisions of both the District Court and the Court of Appeals below condone the exclusion of these nearly 1,800 Chinese youngsters from "student" status. The result is the most severe type of discrimination – one that deprives these children of their rights to free speech and future political participation under the First Amendment and to due process and equal protection of the laws under the Fourteenth Amendment. Such discrimination also entails broad social, economic, and

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[6] Reporter's Transcript of May 12, 1970 hearing in *Lau v. Nichols* (Civ. No. C-70-627 LHB, N.D. Calif. May 26, 1970) at 18.

cultural consequences which will continue to exclude them from the mainstream of American life.

Ironically, the State of California recognizes the great importance of English for these non-English-speaking Chinese students[7] at the very same time its agent – the School District – excludes them from the opportunity to acquire any English-language skills. California, like other states, has enacted laws requiring the compulsory attendance in school of children between specified ages.[8] Similarly, since English is the dominant language in this society, California mandates that English be the sole or primary medium of instruction in the classes which these children must attend.[9] For non-English-speaking students, the result can be viewed – were it not so tragic – as a parody: compulsory attendance laws force the presence of these students in a situation where they cannot possibly receive any benefit or learning. The attendant total exclusion of these students from any educational benefits flows naturally from this sad reality. While English-speaking students are free to raise their hands and ask questions, petitioners and other non-English-speaking students must sit in uncomprehending silence. While petitioners and their English-speaking classmates are given the same books and materials, for petitioners the pages are as if blank, the print conveying nothing.

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[7]While fully endorsing the District Court's characterization of them as "not students" (see text accompanying note 6, *supra*), petitioners in this instant Brief will refer to themselves interchangeably as "students" for purposes of convenience and consistency with the description utilized in both the decisions below and other briefs filed in this case.

[8]Cal. Ed. Code §12101.

[9]Cal. Ed. Code §71. See also Section 8573 of the California Education Code, which imposes a mastery of English as a prerequisite to graduation from a public high school.

This situation of complete exclusion from any access to educational opportunity was recently contrasted by this Court with the conditions confronting the students-appellees in *San Antonio Independent School District v. Rodriguez.*[10] In that case, the students alleged that the Texas school finance system discriminated against poor school districts, resulting in inadequate education being offered to children in those districts. The State of Texas (as appellant) contended that the financing system provided "at least an adequate program of education . . . [for] 'every child in every school district.' "[11] Focusing on the relative nature of the harm alleged by the students, this Court found the Texas financing system did provide a minimally adequate education for all students. In reaching this result, however, this Court observed that no argument was advanced in *Rodriguez* that "children in [relatively poorer districts] . . . are receiving no public education."[12]

> Whatever merit appellees' argument might have if a State's [action] occasioned an absolute denial of educational opportunities to any of its children . . . no charge fairly could be made that the [financing] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[13]

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[10] 93 S.Ct. 1278 (1973) [hereinafter referred to as "*Rodriguez*"].

[11] *Id.* at 1292.

[12] *Id.* at 1291.

[13] *Id.* at 1299. Four years ago, this Court also suggested the Constitutional relevance of totally excluding children from access to any educational opportunities. *Shapiro v. Thompson,* 394 U.S. 613, 633 (1969) (stating that a school district could not save

In the instant case, non-English-speaking Chinese students charge precisely such an absolute denial of educational opportunity. More significantly, they have offered clear proof – including the admissions of the School District itself (see *infra* at pp. 15-16) – that they are denied access to even a minimally adequate education. Unable to communicate or understand the language of instruction, these students are foreclosed from any opportunity "to acquire the basic minimal skills" necessary to function in a classroom, let alone to enjoy "the rights of speech and of full participation in the political process."[14]

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monies by "barring indigent children from its schools"). See also *Hosier v. Evans*, 314 F.Supp. 316 (D.Vir.Is. 1971) (exclusion of aliens from public schools held violative of Equal Protection Clause) and *Ordway v. Hargraves*, 323 F.Supp. 1155 (D.Mass. 1971) (exclusion of pregnant students from regular classes held violative of right to educational opportunities).

[14] *Rodriguez, supra*, 93 S.Ct. 1278, 1299. Though appellees-students' First Amendment arguments in *Rodriguez* were rejected, this Court did explicitly recognize the obvious nexus between an individual's ability to communicate and his exercise of free speech and voting rights. "We need not dispute . . . the proposition" raised by appellees-students that "[t]he 'marketplace of ideas' is an empty forum for those lacking basic communicative tools." *Id.* at 1298. Since non-English-speaking students lack "basic communicative tools" in the language of this society, the "forum" of ideas is truly "empty" for them. In 1966, Fifth Circuit Judge Minor Wisdom made a similar observation in considering the impact of Federal statutes upon Louisiana laws prohibiting assistance to voters in the voting booth:

> We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.
>
> *United States v. Louisiana*, 265 F.Supp. 703, 708 (E.D.La. 1966), *aff'd*, 386 U.S. 270 (1967).

See also *Garza v. Texas*, 320 F.Supp. 131 (W.D.Tex. 1970), where a federal court invalidated Texas laws prohibiting assistance to

The exclusion of non-English-speaking Chinese youngsters from any educational opportunities is admittedly not caused by the School District erecting physical barriers at the schoolhouse door. These children are permitted, indeed required, to sit – and languish – in regular classrooms for six hours a day. Yet, since the instruction in these classrooms is offered in a tongue unfathomable to these children, the result is not education but at best custodial supervision – confinement without rational basis. Nevertheless, the decision below holds that the Constitution can be satisfied by providing all students in San Francisco "with the same facilities, textbooks, teachers and curriculum."[15] Such a test accepts the illusion that educational opportunity results automatically from the receipt by all students of identical treatment. But, as Mr. Justice Frankfurter wrote two decades ago:

> [T]here is no greater inequality than the equal treatment of unequals.[16]

By failing to recognize that education is not solely a matter of physical presence in a classroom, the majority decision below ignores the truth of Mr. Justice Frankfurter's acute observation. The court below failed to recognize that education demands – at a minimum – that these 1,800 non-English-speaking Chinese students be afforded an opportunity to benefit from the offered

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illiterate voters by election officials. Giving illiterate individuals the right to vote, the court said, is no

> more than an empty ritual if the right itself does not include the right to be informed of the effect that a given physical act of voting will produce. *Id.* at 137.

[15] 472 F.2d 909, 916 (App. 128).

[16] *Dennis v. United States*, 339 U.S. 162, 184 (1950) (dissenting opinion).

educational curriculum. As aptly described in the dissenting opinion below,

> the essence of education is communication: a small child can profit from his education only when he is able to understand the instruction, ask and answer questions, and speak with his classmates and teachers. When he cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense.[17]

It is self-evident that a non-English-speaking Chinese student "cannot be said to have an educational opportunity equal to his fellow students unless and until he acquires some minimal facility in English."[18] But this Court need not rely solely on what is obvious. The School District itself has admitted and recognized the educational deprivations suffered by petitioners. Significantly, the School District stipulated in the District Court below that 2,856 non-English-speaking Chinese students in the San Francisco school system lacked an understanding of the English language (App. 45). Of these non-English-speaking Chinese students, the School District admitted that 1,790 were not provided any instruction which would permit them to comprehend and benefit from their classes taught in the English language (App. 45).[19]

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[17] 472 F.2d 909, 919 (dissenting opinion) (App. 132).

[18] *Ibid.*

[19] The School District has described the situation confronting these nearly 1,800 non-English-speaking Chinese youngsters in different ways. For example, it has characterized them as students having "no knowledge of English" who must "learn English so that they can communicate with others and proceed normally with classroom work in our language." San Francisco Unified School District, *Bilingual Education in the San Francisco Unified School District* 1 (Nov 21, 1967) (App. 61). Elsewhere, the students

Moreover, the School District has acknowledged the grave harms and consequences to non-English-speaking Chinese students confronted with instruction in an alien tongue. In 1969, the School District stated:

> When these [non-English-speaking Chinese] youngsters are placed in grade levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular work.[20]

The results of such "inability to understand the regular work" are most immediate and direct.

> For [these] children, the lack of English means poor performance in school. The secondary student is almost *inevitably doomed* to be a dropout and become another unemployable in the ghetto.[21]

The School District's admissions concerning the exclusion of non-English-speaking students from educational opportunity are strongly supported by the weight of

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were described as "need[ing] special instruction in English" (App. 63); the School District also describes its own goal as having "the [non-English-speaking Chinese] student learn English to function in a regular classroom." Defendants' Answer to Interrogatory No. 5(e) (May 26, 1970) (App. 56).

Yet, whatever characterization is employed, the reality of the School District's candid admissions remains the same – thousands of non-English-speaking Chinese youngsters, unable to fathom the classroom work provided to them, are absolutely excluded from the educational process. As the School District itself recognizes, "the only hope" of overcoming this exclusion

> lies in *adequate education*, vastly different in extent of services and in kind from what is available at present.

San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 6A (May 5, 1969) (emphasis added) (App. 104).

[20] *Id.* at 3A (App. 101).

[21] *Id.* at 6A (emphasis added) (App. 103-104).

expert opinion throughout the country. Evidence indicates that children in grade school use language at an accelerating rate for purposes of problem-solving. Yet, the language in which these problems are solved is not available to petitioners. While petitioners' ideas are formed in a native tongue, they must be expressed in school in a language petitioners do not know and cannot use. Not only does problem solving become impossible, but a sense of failure, frustration, and inadequacy results – which leads to loss of interest and "inevitable" abandonment of education.[22] Though experts have developed more than one method of teaching these youngsters, no support can be found for simply allowing non-English-speaking youngsters to languish in classes whose medium of instruction is exclusively tailored to educate English-speaking students, not them.[23]

Petitioners share with all English-speaking children the capacity for learning and the acquisition and improvment

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[22] See, *e.g.*, V. John and V. Horner, *Early Childhood Bilingual Education* (1971); J. Freely, "Teaching Non-English-Speaking First Graders to Read," in *Elementary English* 207 (1970); A. Anastasi and F. Cordova "Some Effects of Bilingualism upon the Intelligence Test Performance of Puerto Rican Children in New York City," 44 *Journal of Educational Psychology* 15 (1963); J. McNamara, "Effects of Instruction in a Weaker Language," 23 *Journal of Social Issues* 22, 132 (1967). For further discussion of such educational literature, see Brief Amicus Curiae of the Center for Law and Education, Harvard University, before the Supreme Court of the United States in support of the Petitioners on the Merits in *Lau v. Nichols* (July 1973).

[23] Thus, the observation in the majority decision below that "there is a dispute among the experts" as to the best method of teaching non-English-speaking youngsters (472 F.2d 909, 917, n. 17 (App. 129)) obscures the fact that petitioners in this case are not being provided with *any* instruction from which any educational benefits can be derived.

of skills. Yet, the actions of the School District, which the majority decision below sanctioned, guarantee that petitioners will never realize their potential. Moreover, the decision below misconstrues the scope of petitioners' Constitutional and statutory rights to an educational opportunity (which will be discussed throughout the remainder of this Brief, *infra*).[24] The decision below also ignores the train of consequences for further education, employment, civic participation, and in general an individual's life potential.[25] In view of these factors, the

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[24] The majority opinion also misstates the nature of the relief sought by petitioners. According to the majority decision, petitioners seek "bilingual compensatory education in the English language." 472 F.2d 909, 910 (App. 117). But as the dissenting opinion recognized, petitioners have "carefully and repeatedly abjured any such objective.... [P]laintiffs seek only that 'defendants ... provide special instruction in English and that such instruction ... be taught by bilingual teachers.'" *Id.* at 919 (App. 133). (In the petition before this Court, the latter claim for instruction taught by bilingual teachers is not being pursued.)

[25] Even the School District recognizes that these factors are directly related to an individual's knowledge of English. In a report concerning non-English-speaking Chinese students, the School District described the Chinatown area of San Francisco, where most petitioners live, as "a slum as well as a ghetto." San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 4A (May 5, 1969) (App. 101).

> In this ghetto one finds substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, severe unemployment and underemployment. Of the 40,000 residents, 40.6% are designated as poor by the Office of Economic Opportunity. Some 12.2% of the poverty rated families have an annual income of less than $2,000. *Id.* at 2a (App. 100).

As the School District admitted, "[t]he low earning capacity of the residents [of this area] *can be attributed to their lack of English.*" *Ibid.* (emphasis added).

The School District also cites 1960 United States Census data showing that the Chinatown area has "the lowest median of school

exclusion of 1,800 non-English-speaking Chinese children from any educational opportunities becomes even more intolerable.

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years completed" in San Francisco. *Ibid.* The 1970 Census data reveal an equally dismal picture. These figures show that residents of San Francisco census tracts numbers 114 and 118 – which comprise that part of San Francisco commonly referred to as "Chinatown" – have completed a median of 5.6 school years as compared to 12.4 school years for San Francisco residents as a whole. U.S. Dept. of Commerce, *1970 Census of Population and Housing: Census Tracts: San Francisco-Oakland, Calif. Standard Metropolitan Statistical Area,* PHC(1) – 189 (1972). Similarly, only 20.9 percent of persons 25 years or older in Chinatown are high school graduates, as compared to 61.8 percent for all residents of San Francisco. *Ibid.*

Moreover, the 1970 Census data continue to reflect the "ghetto" conditions which the School District has recognized are endured by non-English-speaking Chinese students. While Chinese individuals make up approximately eight percent of San Francisco's total population, nearly 22 percent of the families in Chinatown live below poverty guidelines set by the United States government (as compared to 9.8 percent of all families in San Francisco). *Ibid.* Similarly, the median income of families in the Chinatown area is $5,794, as compared to $10,503 for San Francisco as a whole. *Ibid.* Finally, as an indice of Chinatown's substandard housing conditions, nearly 73 percent of the households in this area lacked some or all plumbing, as compared to only 14.4 percent of all households in San Francisco. *Ibid.*

Even a casual analysis of these 1970 United States Census data demonstrates why the School District has "assumed" Chinese children living in the Chinatown area "are from low income families . . . [which] have a mother tongue (Cantonese) other than English." San Francisco Unified School District, *Pilot Program: Chinese Bilingual* 10 (May 5, 1969), Plaintiffs' Exhibit No. 5.

II

THE DECISION BELOW WAS PREMISED ON ERRONEOUS INTERPRETATIONS OF PETITIONERS' CONSTITUTIONAL RIGHT NOT TO BE ARBITRARILY DENIED AN EDUCATIONAL OPPORTUNITY.

A. The Equal Treatment of Unequals Does Not Comport With the Requirements of the Equal Protection Clause of the Fourteenth Amendment.

The School District's equal treatment of all students within its system has resulted in the classification of pupils into two groups. One group – the approximately 90,000 English-speaking students who possess the language skills required to handle the English-taught public school curriculum – is provided educational opportunities. The other group, consisting of petitioners and thousands of other non-English-speaking Chinese students, is automatically foreclosed from such opportunities. That such a duality of treatment amounts to a discriminatory classification in violation of the Fourteenth Amendment guarantees of equal protection of the laws and equality of educational opportunities is manifest. Yet, the decision below excludes these non-English-speaking Chinese youngsters from the protection of the Fourteenth Amendment on the ground that the discrimination

> is not the result of laws enacted by the State presently or historically, but the result of deficiencies created by the appellants themselves in failing to learn the English language.[26]

In essence, the Ninth Circuit interprets the Equal Protection Clause as requiring a showing that the state

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[26] *Lau v. Nichols*, 472 F.2d 909, 917 (App. 128-129).

caused petitioners' language disabilities or had a specific intent to discriminate. Absent such requisites, the Ninth Circuit holds a school district has no obligation to provide any meaningful educational opportunity to non-English-speaking children.

Besides being a "callous and inaccurate" description of petitioners' plight,[27] the Ninth Circuit's interpretation of the Equal Protection Clause is clearly erroneous.[28] There can be no doubt today that the Equal Protection Clause forbids not only different treatment of similarly situated persons, but also identical treatment of persons who are not similarly situated. In some cases, the inequality may occur in the form of disabilities caused by state action or of present differences which result from past state discrimination.[29] But, facially even-handed treatment by

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[27] *Id.* at 922 (dissenting opinion) (App. 138).

[28] Significantly, the majority decision below offers no support for its view concerning the nature and scope of the Equal Protection Clause. *Id.* at 917 (App. 129).

[29] Though past intentional discrimination is not a requisite for invocation of the Equal Protection Clause (see pp. 25-27 of this instant Brief, *infra*), there is evidence of such past discrimination by the School District against Chinese-speaking students. "Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown v. Board of Education* . . . ." *Lee v. Johnson*, 404 U.S. 1215, 1215-1216 (1971) (per Douglas, J., as Circuit Justice on application for stay); see also *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 4, n. 3 (June 18, 1973) (dissenting opinion) (App. 145). Historical discrimination against Chinese students is documented in the Brief Amicus Curiae of the Center for Law and Education, Harvard University, before the Supreme Court of the United States in Support of the Petition for Writ of Certiorari in *Lau v. Nichols*, pp. 14-15 (April 1973).

a state can deny equal protection even where the present differences were neither created by the state nor the product of past discrimination:[30]

The instant case is analogous to a hospital administering to all patients the same drug, which is helpful to some patients and harmful to others. The School District has similarly administered to all students instructional programs which benefit some students and harm, as the School District itself has admitted, others – the petitioners. The resulting exclusion of non-English-speaking Chinese students from any educational opportunities thus stems directly from actions taken by the School District.[31] Yet, the Ninth Circuit gave no Constitutional weight to this significant state involvement because of the court's singularly narrow view of the ambit of the Equal Protection Clause. To the court below, equal protection guarantees can only be invoked when the petitioners' underlying disabilities – their English-language deficiency – were "caused directly or indirectly by any State action"[32] or stem from intentional or purposeful discrimination by the School District.[33] But numerous decisions of this Court[34] require invocation of equal protection guarantees where the state's apparently even-

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[30] *E.g., Bullock v. Carter,* 405 U.S. 134 (1972); *Mayer v. Chicago,* 404 U.S. 189 (1971); *Williams v. Oklahoma City,* 395 U.S. 458 (1969); *Douglas v. California,* 372 U.S. 353 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956).

[31] See subsection B of Point II, *infra,* at pp. 30-33 for a detailed discussion of this pervasive state action by the School District.

[32] *Lau v. Nichols,* 472 F.2d 909, 916 (App. 127).

[33] *Id.* at 914 (App. 124).

[34] *E.g.,* cases cited in note 30, *supra.* These cases will be discussed in notes 48-56 and the text accompanying those notes, *infra.*

handed action produced a discriminatory impact, quite apart from any State causation or intent.

The failure of the Ninth Circuit to consider and apply these decisions stems from its erroneous interpretation of this Court's decision in *Brown v. Board of Education*[35] that belies both the historical and logical essence of that case. To the majority below, *Brown* is satisfied merely by providing non-English-speaking Chinese students "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district."[36] In fact, however, *Brown* was not satisfied with such mere superficial equality. The *Brown* decision itself shows this Court has looked beyond the surface equality of facilities and services to the crucial, often intangible, factors which go to make up a child's educational experience.[37] In piercing the surface equality of such " 'tangible' factors,"[38] this Court in *Brown* relied on two earlier decisions which recognized that education in its essence involves much more than equal books, courses, and desks.

In the first case, *Sweatt v. Painter*,[39] this Court found that a newly established segregated law school was unequal to the University of Texas law school. The Court reached this decision, in part, because black students were being isolated from the creative intellectual life of the older white school. "Few students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views. . . ."[40] Similar-

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[35] 347 U.S. 483 (1954).

[36] *Lau v. Nichols*, 472 F.2d 909, 916 (App. 128).

[37] *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).

[38] *Ibid.*

[39] 339 U.S. 629 (1950).

[40] *Id.* at 634 Petitioners in the instant case have been thrust into a similar "academic vacuum" since they are unable to communicate with their teachers or fellow students.

ly, in the other case, *McLaurin v. Oklahoma State Regents,*[41] the fact that a black graduate student "uses the same classroom, library and cafeteria as students of other races"[42] did not deter this Court from finding equal protection violations. As explained in *Brown*, the *McLaurin* decision focused on the impairment of

> intangible considerations: '. . . [the student's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.'[43]

The McLaurin decision concluded that "the result"[44] of such impairment was the denial of educational opportunities. Yet, the Ninth Circuit has concluded that this same denial of educational opportunities, as suffered by petitioners in this case, is Constitutionally irrelevant.[45]

The mere surface equality of "facilities, textbooks, teachers and curriculum"[46] in the instant case cannot mask the absolute impairment of non-English-speaking Chinese students' ability to function in their classroom society. Indeed, the "academic vacuum" and educational deprivations confronting petitioners are more severe than those in *Brown, Sweatt,* and *McLaurin* – for at least students in those cases could understand their teachers, fellow students, and the materials of instruction. On the other hand, petitioners

> are more isolated from equal educational opportunity than were those physically segregated blacks

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[41] 339 U.S. 637 (1950).

[42] *Id.* at 640.

[43] *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

[44] 339 U.S. 637, 641.

[45] *Lau v. Nichols,* 472 F.2d 909, 912-915 (App. 120-125).

[46] *Id.* at 916 (App. 128).

in *Brown* [since non-English-speaking Chinese] children cannot communicate at all with their classmates or teachers.[47]

The School District in the instant case cannot thus avoid the proscriptions of the Fourteenth Amendment by denying any blame for creating petitioners' English-language deficiency. Nor can the School District escape the mandate of this Court's decisions by claiming that it treats all students identically. Providing non-English-speaking Chinese students with the same medium of instruction as English-speaking students does not constitute either neutral or even-handed treatment when the medium is tailored to serve only English-speakers and not petitioners. Since School District actions have a severe discriminatory impact on these non-English-speaking Chinese students, they must be held violative of petitioners' right to equal educational opportunities. As stated last year, this Court determines such constitutional violations by focusing

> upon the effect – not the purpose or motivation – of a school board's action .... The existence of a permissible purpose cannot sustain an action that has an impermissible effect.[48]

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[47] *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 2 (June 18, 1973) (dissenting opinion) (App. 142-143).

[48] *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972). Similar language appears in *Hunter v. Erickson* (393 U.S. 385 (1969)), where this Court pierced a housing ordinance which appeared neutral but, in reality, burdened minority groups. This Court stated

> Moreover, though the law on its face treats Negro and white, Jew and gentile, in an identical manner, *the reality* is that the law's impact falls on the minority. *Id.* at 391 (emphasis added).

Moreover, in areas outside the educational field, this Court has consistently granted relief under the Equal

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Cf., Committee for Public Education and Religious Liberty v. Nyquist, 93 S.Ct. 2955, 2962 (1973), where this Court analyzed the realistic effect of which "nonpublic schools . . . would benefit from" New York laws providing financial assistance to nonpublic elementary and secondary schools.

This Court's practice of focusing on the discriminatory effect of a particular action is not of recent origin. *E.g., Baker v. Carr*, 369 U.S. 186, 226 (1962); *Oyama v. California*, 332 U.S. 633, 639 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). (As in the instant case, the discrimination in both *Oyama* and *Yick Wo, supra*, was based upon the respective petitoners' national origin of Japanese and Chinese ancestry. The significance of this "national origin" discrimination will be discussed in Point III, subsection A, *infra.*)

Moreover, lower federal courts have implemented this principle in a variety of contexts. Mr. Justice Clark, sitting by designation, has stated the rule as follows:

> Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its [minority] citizens under a severe disadvantage which it cannot justify.
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> *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971).

See also *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 438 F.2d 1167 (2d Cir. 1972); *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.Mex. 1972). As recently stated by the Fifth Circuit, *en banc*, in disposing of a petition for rehearing in *Hawkins v. Town of Shaw, supra*, at 1172-1173:

> In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for 'equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; . . . 'we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to

Protection Clause against discrimination resulting from inequalities for which the state was in no way responsible.[49] Many of these cases deal with the obligation of the state to provide special services to criminal defendants who are unable to pay for such services themselves.[50] In all these criminal cases, this Court held that a person's poverty may not be the basis for denying him the same opportunities to defend against criminal charges as are enjoyed by those who can afford the necessary services. This Court required the state in each of these cases to redress the inequality without regard to whether the state in some way caused the inequality in the first place.[51]

Significantly, the duty of a state to recognize differences between individuals, even when not initially responsible for those differences, was imposed by the United States Court of Appeals for the Second Circuit in a case where English-language barriers confronted a criminal

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private rights and to public interest as the perversity of a wilful scheme.' (Citation omitted) (emphasis theirs).

[49] *E.g., Reitman v. Mulkey*, 387 U.S. 369 (1967) (discrimination in housing); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (discrimination in voting).

[50] *E.g., Mayer v. Chicago*, 404 U.S. 189 (1971); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

[51] The majority decision below distinguishes these criminal cases on the ground that

> the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists.

Lau v. Nichols, 472 F.2d 909, 916 (App. 127).

Initially, it must be pointed out that this description of the rationale employed in these criminal cases is not accurate. This

defendant.[52] In that case, a Spanish-speaking man was tried in a New York City criminal court in which neither his lawyers, his accusers, the witnesses, or officers of the court spoke any Spanish. The non-English-speaking defendant received only "spasmodic and irregular" translations[53] of the proceedings against him, with such translations being conducted by an interpreter employed by the prosecution.

In upholding the granting of a writ of *habeas corpus*, the Court of Appeals observed that "[t]o Negron, most of the trial must have been a babble of voices."[54] It further observed that, while Negron was accorded all the rights given other criminal defendants, he was in effect given no meaningful opportunity to participate in his trial.

> Not only for the sake of effective cross examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.[55]

Court subjected the discrimination in many of these cases to the most strict judicial scrutiny rather than the more general "rationale basis" standard of review. *E.g., Mayer v. Chicago, supra,* and *Griffin v. Illinois, supra.* More importantly, the decision below fails to recognize that the purpose for which an educational system exists is to educate students, not to fail to do so. As in the criminal cases, the employment of any means which deprive thousands of students of any educational opportunities equally "has no relationship to the purpose for which the [educational] system exists." *Lau v. Nichols,* 472 F.2d 909, 916 (App. 127). See Point III, subsection B, *infra,* for a fuller discussion about how the School District's discriminatory actions do not even satisfy the "rational basis" standard of review.

[52] *United States ex rel. Negron v. State of New York,* 434 F.2d 386 (2d Cir. 1970).

[53] *Id.* at 388.

[54] *Ibid.*

[55] *Id.* at 390.

The Constitutional claim advanced by Negron – and the remedy afforded him – are not different in kind from those sought in this case. Both Negron and the instant petitioners face discrimination against them because of their inability to understand English. For Negron, the failure of the State to provide him a translator produced the ensuing discrimination. For petitioners, the similar failure of the School District to provide them access to translation, which would let them understand and benefit from the English-language curriculum, has caused the discrimination that totally excludes them from the educational process. As the *Negron* court stated:

> Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of [a non-English-speaking person].[56]

That language barrier is equally crippling – let alone violative of Constitutional protections – to non-English-speaking Chinese students who cannot understand the only language spoken and used at school. Yet, the court below has employed its misconceived interpretation of equal protection guarantees to completely exclude such youngsters from receiving any educational benefits. In so doing, the court below reached a most singular, drastic, and Constitutionally erroneous conclusion – that children who are not out of the same mold as the norm can effectively be excluded from any educational opportunities.[57] The Ninth Circuit's metaphor of the "starting

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[56] *Ibid.*

[57] Every student brings to the starting line of his educational career different advantages and disadvantages . . . created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the [School District] of educational opportunities within the

line" of educational careers is particularly inappropriate, since the School District has ensured that non-English-speaking Chinese students will never reach that line.

In essence, the identical treatment of English and non-English-speaking students by the School District is analogous to "the fabled offer of milk to the stork and the fox," which was cited by this Court in *Griggs v. Duke Power Co.*[58] As in the fable, identical treatment in this case does

> not provide equality of opportunity.... [The School District must] provide that the vessel in which the milk is proffered be one all seekers can use.[59]

B. The Exclusion of Petitioners from Any Educational Opportunity Stems Directly from Actions Taken by the School District.

The Court of Appeals' erroneous belief that the School District must cause or intend petitioners' English-language disabilities is coupled with a parallel misconception concerning the pervasive state action in this case. In reaching its decision, the court below found that the discrimination suffered by petitioners stemmed from their failure to learn English before reaching the schoolhouse and not from any state action by the School District.

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meaning of the Fourteenth Amendment should the [School District] fail to give them special attention, this even though they are characteristic of a particular ethnic group. *Lau v. Nichols*, 472 F.2d 909, 915 (App. 126).

[58] 401 U.S. 424 (1971).

[59] *Id.* at 431.

> Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system.[60]

For purposes of equal protection analysis, however, the issue is not what advantages or disadvantages petitioners bring to the starting line, but whether the rules of the race – while benefitting some students – ensure that non-English-speaking Chinese students cannot successfully compete. And it is the School District that has actively, and knowingly, made the rules which guarantee that non-English-speaking Chinese students will compete against all other children with an insurmountable burden – lack of knowledge of English.

Contrary to the characterization in the decision below, the School District has not played a passive role in regard to non-English-speaking Chinese students. First, it is the State which imposes, and the School District which enforces, the requirement that these children go to school and attend classes whose content is wholly incomprehensible to them.[61] The stark irony is that non-English-speaking Chinese children are thus compelled to attend schools which absolutely fail to educate them. Moreover, it is the School District which effectuates the legal mandates requiring English as "the basic language of instruction in all schools"[62] and requiring a mastery of English to graduate high school[63] – requirements which are of no value to non-English-speaking Chinese children.

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[60] *Lau v. Nichols*, 472 F.2d 909, 915 (App. 126).

[61] Cal. Ed. Code §12101.

[62] Cal. Ed. Code §71.

[63] Cal. Ed. Code §8573.

The School District, in essence, has chosen a curriculum which guarantees that non-English-speaking Chinese students will not receive any educational opportunities. In a recent similar case, a federal district court in New Mexico found such conduct by a school system constituted state action.[64] The federal court held that the school system denied an educational opportunity to Spanish-surnamed students by providing educational programs which benefitted only English-speaking students. In reaching this result, the court disposed of the school system's argument that the discrimination suffered by Spanish-surnamed children was "not the result of state action."[65]

> The promulgation and institution of a program by the Portales school district which ignores the needs of [Spanish-speaking minority] students does constitute state action.[66]

Through its incontrovertibly active role, the School District in the instant case has created two classifications of students. One class consists of students from English-speaking backgrounds who are able to comprehend the language of the classroom. The other class is composed of non-English-speaking students who neither understand the language of instruction nor are given any help in learning that language. These classifications – and the resulting discrimination – become operative only through explicit choices, decisions, rules, and practices of the

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[64] *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.Mex. 1972).

[65] *Id.* at 1282.

[66] *Id.* at 1283.

School District. As stated in the dissenting opinion from the denial of an *en banc* hearing in the Ninth Circuit:

> The pervasive involvement of the state with the very language problem challenged forbids the majority's finding of no state action.[67]

III

THE DECISION BELOW FAILED TO EXERCISE THE STRICT JUDICIAL SCRUTINY REQUIRED WHEN PRIMA FACIE DISCRIMINATION EXISTS AGAINST MEMBERS OF A DISTINCT ETHNIC AND NATIONAL ORIGIN GROUP.

A. Since the Disabilities Suffered by Petitioners Are Based Upon the "Suspect Classification" of Their Ethnicity and National Origin, This Court Must Invoke the Closest Judicial Scrutiny, Under Which the School District Can Show No Legitimate or Substantive Interest To Justify the Discrimination.

As a result of its singular view of the Equal Protection Clause, the Ninth Circuit decision below is not clear concerning what standard of review, if any, was utilized to test petitioners' claim of total denial of educational opportunities. Though never explicitly explained, the decision apparently employed the traditional rational

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[67] *Lau v. Nichols*, Order Denying Request for En Banc Consideration, 3 (June 18, 1973) (dissenting opinion) (App. 143). In support of its finding of School District state action, this dissenting opinion relied on four cases decided by this Court – *Bullock v. Carter*, 405 U.S. 134 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948); and *Nixon v. Condon*, 286 U.S. 73 (1932). *Ibid.* The respective amount of state action in each of these cases was in no way as pervasive or substantial as the involvement of the School District in the discrimination suffered by non-English-speaking Chinese students. Nevertheless, this Court found there was sufficient state action in each of these four cases for purposes of redressing discriminatory violations under the Fourteenth Amendment.

basis standard of review.[68] As will be shown in subsection B of Part III, *infra*, the School District has adopted and perpetuated a classification which cannot pass muster even under the rational basis test enunciated in such cases as *McGowan v. Maryland*[69] and *Williamson v. Lee Optical of Oklahoma.*[70] Yet, since the discrimination against petitioners is based upon the "suspect classification" of their ethnicity and national origin, it must be subjected to the most strict judicial scrutiny;[71] this Court's recent decision in *San Antonio Independent School District v. Rodriguez* reaffirms this constitutional mandate of such close scrutiny.[72]

The charge by non-English-speaking Chinese students that the School District is discriminating against them on the basis of national origin[73] does not stem solely from the fact that the District's actions have an unequal effect on an identifiable racial and ethnic minority. For, as the School District itself recognizes (see pp. 15-16, 18, *supra*), the distinction which triggers the inequality suffered by petitioners is one which intimately originates from their nationality: language. The language of any group is an index of its major characteristics. The reason petitioners

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[68] *Lau v. Nichols*, 472 F.2d 909, 916, 917 (App. 127, 129).

[69] 366 U.S. 420 (1961).

[70] 348 U.S. 483 (1955).

[71] *E.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Oyama v. California*, 332 U.S. 633, 644-646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[72] 93 S.Ct. 1278, 1294 (1973).

[73] The Ninth Circuit decision states that petitioners have never alleged any discrimination on the basis of national origin. *Lau v. Nichols*, 472 F.2d 909, 917 (App. 129). Such a statement,

thus speak Chinese and not English is that their national origin and ethnic identity is Chinese. Clearly then, the source of petitioners' educational deprivation lies in the School District's choice of English as the medium of classroom instruction, coupled with its failure to provide any language instruction to non-English-speaking Chinese children burdened by that choice. The discriminatory classification erected – between school children who receive instruction in a language they understand and those who do not – inevitably excludes non-English-speaking Chinese students from any educational opportunities. Since these severe educational harms result from a language distinction which coincides precisely with a fundamental characteristic distinguishing nationalities, the discrimination becomes one even more sharply based on national origin.[74]

The decision by this Court in *San Antonio Independent School District v. Rodriguez* serves to reinforce petitioners' claim of discrimination on the basis of national origin. In *Rodriguez*, this Court rejected the contention that Texas' school financing scheme discriminated against poor individuals on the basis of the

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however, contravenes the explicit allegations in Petitioners' Complaint and, specifically, their Fourth Cause of Actions (App. 18-19).

The majority decision's erroneous statement concerning petitioners' claim of national origin discrimination is compounded by its failure to recognize the strict standard of review which such discrimination requires from a court. The decision below states that the actions of the School District do not fall "within the meaning of the Fourteenth Amendment ... these even though [petitioners] are characteristic of a particular ethnic group." 472 F.2d 909, 915 (App. 126). The cases of this Court cited in note 71, *supra*, directly contradict such treatment of a "particular ethnic group" alleging discriminatory actions.

[74] See, *e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Clearly, their linguistic and cultural characteristics identify

"suspect classification" of wealth.[75] In so doing, it described the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny:

> [T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

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Chinese petitioners in both the school and community as surely as black skin color identifies black children. Thus, what a federal district court found for Mexican-American Spanish-speaking children suffering ethnic-based discrimination in Texas applies equally to the Chinese petitioners:

> [These] students exhibit numerous characteristics which have a causal connection with their general inability to benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans. These characteristics include 'cultural incompatibilities' and English language deficiencies – two traits which immediately and effectively identify those students sharing them as members of a definite group whose performance norm habitually will fall below that of Anglo-American students who do not exhibit these traits. It would appear, therefore . . . that it is largely these ethnically-linked traits . . . which account for the identifiability of Mexican-American students as a group and which have, as a consequence, elicited . . . the different and often discriminatory treatment. . . .
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> *United States v. Texas* 342 F.Supp. 24,26 (E.D.Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

[75] This Court cited two reasons why the disadvantaged individuals in *Rodriguez* were not "susceptible to identification" as a suspect class:

> [T]he absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education.
>
> *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1292.

Regardless of whether wealth is a suspect classification, the national origin discrimination suffered by petitioners clearly is. Similarly, unlike the factual situation in *Rodriguez*, petitioners

political powerlessness as to command extraordinary protection from the majoritarian political process.[76]

That individuals of Chinese ancestry like petitioners fall within such "indicia of suspectness" cannot be disputed.[77] In fact, the doctrine of such "extraordinary [Constitutional] protection" was articulated by this Court nearly 100 years ago in a case involving Chinese residents of San Francisco.[78] There, this Court found that the "actual operation" of San Francisco's laundry licensing ordinance was to deny Chinese laundrymen equal protection of the laws.[79] Recognizing the "political powerlessness" of such individuals, this Court did not hesitate then – nor has it since – to look behind a facially neutral state action when the burden of such action is felt by one particular ethnic or national origin group. Thus, when Chinese-speaking merchants 40 years after *Yick Wo* challenged a Philippines ordinance as being

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have shown an absolute denial of educational opportunities. In *Rodriguez*, this Court said "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal [educational] skills." *Id.* at 1299. In the instant case, non-English-speaking Chinese students have not just demonstrated the relative denial of educational opportunities, but the complete absence of any such opportunities.

[76] 93 S.Ct 1278, 1294 (1973).

[77] See, *e.g.*, note 29, *supra*, concerning the "history of purposeful unequal treatment" (*ibid.*) to which Chinese individuals in this country have been subjected. Such treatment, which burdened them in business as well as schools, often focused on their language in imposing discrimination. For example, until the current version of California Education Code §71 was enacted in 1967, the teaching by languages other than English was prohibited in California. See, *e.g.*, 1943 California Education Code §8251.

[78] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[79] *Id.* at 373.

discriminatory against them, this Court gave close scrutiny to their claim.[80] Like petitioners in the instant case, these Chinese merchants asserted that the governmental discrimination arose because they could neither speak nor write any language except Chinese. The ordinance in the *Yu Cong Eng* case required the keeping of business account books in the Philippines in English, Spanish, or a local dialect. Despite the obvious usefulness of the ordinance in assisting local tax collection and auditing, this Court focused on the discriminatory impact which the ordinance had on Chinese-speaking merchants and found such discrimination denied them equal protection of the laws.

Cases involving other national origin groups confirm that the Chinese petitioners are members of an ethnic minority entitled to close judicial scrutiny.[81] They constitute, as this Court has recognized since its 1886

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[80] *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

[81] *E.g., White v. Regester*, 93 S.Ct. 2332 (1973), where this Court reaffirmed that Mexican-Americans constitute an identifiable ethnic group for purposes of Fourteenth Amendment protection. Like the non-English-speaking Chinese petitioners, "[t]he typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult." *Id.* at 2340. See also *Keyes v. School District No. 1, Denver*, where this Court not only confirmed the status of Mexican-Americans as an identifiable ethnic group, but also recognized that they – like the Chinese petitioners – "suffer from the same educational inequities as Negroes and American Indians." 93 S.Ct. 2686, 2692 (1973).

Recognition of ethnic distinctiveness and identifiability of the Chinese minority has also been made by numerous governmental agencies – including the School District itself. See, *e.g.*, pp. 15-16,

decision in *Yick Wo v. Hopkins,*[82] "a discrete and insular minorit[y against whom] the operation of those political processes ordinarily to be relied upon to protect minorities [has been] curtail[ed]."[83]

Petitioners thus fall directly within the ambit of the special judicial protection accorded "suspect classes." Therefore, the discrimination by the School District against these non-English-speaking Chinese students must "withstand the strict judicial scrutiny that this Court has found appropriate . . . [when] suspect classifications" are

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supra, of the instant Brief. Moreover, even the Ninth Circuit below recognized that the Chinese petitioners' lack of English-language skills is "characteristic of a particular ethnic group." *Lau v. Nichols,* 472 F.2d 909, 915 (App. 126). Yet, since many Chinese students in San Francisco schools do understand English, the opinion concurring in the rejection of Ninth Circuit *en banc* consideration of this case indicated petitioners should not be given the special protection traditionally shown ethnic group members. *Lau v. Nichols,* Order Denying Request for En Banc Consideration, 7 (June 18, 1973) (concurring opinion) (App. 147). It is hardly surprising that no support was offered for this unique observation. This Court has never required that the discriminatory impact of a state action fall equally on all members of an ethnic group. The fact that petitioners represent thousands of non-English-speaking Chinese students in San Francisco alone constitutes a sufficient showing of widespread discrimination which requires this Court's closest attention.

[82] 118 U.S. 356 (1886).

[83] *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4 (1938). This statement in *Carolene Products* was recently cited with approval and applied by this Court in *Sugarman v. Dougall,* where this Court invoked "a more searching judicial inquiry" (*United States v. Carolene Products Co., supra, ibid.*) to discrimination suffered by aliens. 93 S.Ct. 2842, 2847 (1973).

involved.[84] Strict scrutiny, according to the *Rodriguez* decision,

> means that the State's [action] is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'least drastic means' for effectuating its objectives.[85]

Clearly, the School District in this case can not meet such a test. In fact, throughout this entire case, the School District has never alleged – let alone shown – any legitimate or substantive interest to satisfy its "heavy burden of justif[ying]" its exclusion of petitioners from any educational opportunity.[86] Since no such justification does or could exist, the discrimination suffered by these non-English-speaking Chinese students must be found violative of Fourteenth Amendment equal protection guarantees.

B. The School District Has Shown No Rational Basis for Excluding Non-English-Speaking Chinese Children From an Educational Opportunity.

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[84] *San Antonio School District v. Rodriguez*, 93 S.Ct. 1278, 1287.

[85] *Id.* at 1288.

[86] Through its silence, the School District – like the State of Texas in the *Rodriguez* case (*ibid.*) – has implicitly recognized that it could never meet the rigors of this Court's strict scrutiny standard. Moreover, petitioners have consistently asserted throughout this case that no such interest could ever be advanced or fathomed by the School District. Since the Ninth Circuit decision below erroneously failed to acknowledge and apply the strict scrutiny test, it never even considered the existence of such interests.

The foregoing discussion has amply demonstrated the School District's inability to withstand the close judicial scrutiny invoked for the protection of distinct ethnic, national origin group members. Yet, the discriminatory actions of the School District cannot even satisfy the less exacting "rational basis" standard of Constitutional review.[87] The School District's purpose in providing public schools is to educate students, not to fail to do so. For the School District to operate a system of education which arbitrarily and foreseeably withholds the tools of comprehension from a large minority of students not only spites its own goals, but constitutes the zenith of irrationality. To employ means which deprive thousands of non-English-speaking Chinese students of any educational opportunities surely does not further "a legitimate state purpose or interest."[88]

At no time in this case has the School District even attempted to point to any state policy or interest which its discriminatory treatment of petitioners purports to further. Indeed, Section 71 of the California Education Code provides that "[i]t is the policy of the state to insure the mastery of English by all pupils in the schools." By requiring that non-English-speaking Chinese students speak and understand English to receive any educational opportunities – while at the same time failing to provide them any instruction to learn English – the School District has turned this objective on its head and defeated, not effectuated, the state's announced goal.

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[87] As this test has recently been described by this Court, the question under the rational basis standard is whether the School District's treatment of petitioners "bears some rational relationship to a legitimate state purpose." *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1302 (1973).

[88] *Id.* at 1308. In *Rodriguez*, this Court found that the Texas system of school financing bore some rational relationship to the

The School District's treatment of non-English-speaking Chinese students makes sense only if its purpose is to limit the teaching of English and other subjects to those

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legitimate state interest in local control of education. Unlike the instant case, this Court in *Rodriguez* recognized that the disbursement of state and local tax revenues involves "an area in which [this Court] has traditionally deferred to state legislatures." *Id.* at 1300. The complexity of state fiscal schemes plus the "persistence of attachment to government at the lowest level where education is concerned" (*id.* at 1305) were two crucial factors in support of this Court's decision that the Texas financing system had a rational basis.

In the instant case, this Court is concerned with total educational deprivations suffered by non-English-speaking children, not with complex issues of the relative merits of complicated tax programs. Unlike the situation in *Rodriguez*, there is no lack of consensus or raging "sources of controversy concern[ing] the extent to which there is a demonstrable correlation" between non-English-speaking children receiving only English-language instruction "and the quality of education." *Id.* at 1302. Since petitioners cannot fathom or comprehend the instruction given them, the quality of "education" they receive is zero. Similarly, this Court in *Rodriguez* exercised judicial restraint in part because "the question regarding the most effective relationship between state boards of education and local school boards . . . is now undergoing searching re-examination." *Id.* at 1302. No such complex educational problems confront this Court in the instant case.

Finally, the relief requested by petitioners will in no way "result in a comparable lessening of desired local autonomy" which was of serious concern to this Court in *Rodriguez*. *Id.* at 1307. Providing non-English-speaking Chinese students with educational opportunities will not diminish the School District's legitimate "control over local policies." *Ibid.* The School District will continue to possess and exercise its substantial discretion in considering and selecting the means to provide instruction to these petitioners. The only limitation imposed on that discretion will be that which is mandated by the First and Fourteenth Amendments and the Civil Rights Act of 1964.

students who come from English-speaking homes.[89] However, this Court has always insisted not only that a state's action be rationally related to its purpose, but that the purpose itself be a permissible one.[90] To openly and callously discriminate in favor of the majoritarian English-speaking children in the schools could hardly constitute such a legitimate state purpose.

Finally, the Ninth Circuit's only suggested rationale for the School District's manifest discrimination against petitioners was that

> the State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established.[91]

Petitioners not only agree that mastery of English constitutes a laudable instructional goal but, indeed, pursuit of that goal for non-English-speaking Chinese children is the very point of the instant litigation. Yet, the Ninth Circuit has upheld School District action which ensures the defeat of this goal – and the concomitant defeat of the State's avowed purpose to educate students – for thousands of non-English-speaking Chinese students.

Since the court below emphasized that "[t]his is an

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[89] Such a purpose would in essence reward children who are fortunate enough to have English-speaking parents and penalize those who do not. Unfortunately, this is the very situation which now exists in San Francisco schools.

[90] *E.g.*, *San Antonio Independent School District v. Rodriguez*, 93 S.Ct. 1278, 1302 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-173 (1972). See also *United States Department of Agriculture v. Moreno*, 93 S.Ct. 2821, 2825 (1973).

[91] *Lau v. Nichols*, 472 F.2d 909, 916 (App. 127).

English-speaking nation,"[92] the importance of not excluding petitioners from educational opportunities because of their lack of English language skills is further underscored. Ironically, petitioners seek precisely that knowledge and "appreciation of English" which the Ninth Circuit itself recognized as "essential to an understanding of legislative and judicial proceedings."[93] What the court below failed to recognize was that such "appreciation of English" is equally "essential" – indeed mandatory – if non-English-speaking Chinese students are to receive any educational opportunities. The decision below, however, sanctions the School District's denial to petitioners of these very skills.

IV

THE TOTAL EXCLUSION OF PETITIONERS FROM ANY EDUCATIONAL OPPORTUNITY VIOLATES THE CIVIL RIGHTS ACT OF 1964.

In addition to contravening the mandates of the United States Constitution, the School District's discriminatory treatment against petitioners on the basis of their ethnicity and national origin constitutes a violation of Section 601 of the Civil Rights Act of 1964.[94] In Title VI of this Act, the United States Congress expressly prohibited discrimination based "on the ground of race, color, or *national origin*" in "any program or activity receiving federal financial assist-

[92] *Ibid.* While this description by the court below may be good normative rhetoric, it is not wholly accurate. That this is not totally "an English-speaking nation" is poignantly reflected in the complete lack of English-language skills which burdens petitioners and thousands of other non-English-speaking Chinese children in San Francisco schools.

[93] *Ibid.*

[94] 42 U.S.C. §2000d.

ance."[95] To effectuate these goals, HEW was given the authority to promulgate regulations prohibiting discrimination in federally assisted school systems.[96] As a condition of receiving federal funds, recipients are required to submit assurances that they are in compliance with Title VI and the federal regulations promulgated thereunder.[97]

There is no dispute that the San Francisco Unified School District annually receives millions of dollars of federal financial assistance.[98] As recipient of such funds, the School District is obligated under the terms of Section 601 of the Civil Rights Act to provide non-English-speaking Chinese students an equal educational opportunity free from any discrimination based on national origin.[99] More significantly, the School District's statutory duty includes taking affirmative steps to eliminate such discrimination. This obligation was first delineated in March of 1968, when HEW's Office for Civil

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[95] *Ibid.* (emphasis added).

[96] 42 U.S.C. §2000d-1. Regulations issued by HEW have the full effect of law. 45 C.F.R. Part 80 (1969).

[97] 45 C.F.R. Part 80.4 (1969). The San Francisco Unified School District has regularly submitted such assurances to HEW. See note 99, *infra.*

[98] See, *e.g.*, the annual *Facts and Figures* report issued by HEW's Office of Education, Information Services and Public Relations.

[99] The School District has submitted the requisite assurances to HEW that "in consideration of and for the purpose of obtaining any and all ... Federal financial assistance," the School District "will comply with title VI ... and *all requirements imposed by or pursuant to the Regulation* [45 C.F.R. Part 80]." HEW Form 441, executed between the School District and HEW Office of Education (Jan. 20, 1965) (emphasis added). This Form 441 is attached as pp. 4a-5a of the Appendix to this instant Brief.

Rights issued a set of policies to implement Title VI.[100] These policies require school systems to take affirmative action to assure that non-discriminatory equal educational opportunities exist in fact for all students.

> [S]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system.[101]

To further clarify the responsibilities of school districts with respect to national origin-minority group children such as petitioners, HEW issued additional guidelines on July 10, 1970.[102] These rules deal explicitly with the responsibilities of federally assisted school districts to provide equal educational opportunities to those children deficient in English language skills. They were based on a finding by HEW that "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program."[103] Moreover, HEW found such linguistic deficiencies have "the effect of denying equality of educational opportunity to . . . disadvantaged pupils from

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[100]United States Department of Health, Education and Welfare, Office for Civil Rights, "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964," 33 C.F.R. 4955 (1968).

[101]*Id.* at subpart B (§8).

[102]United States Department of Health, Education and Welfare, Office for Civil Rights, "Identification of Discrimination and Denial of Services on the Basis of National Origin," 35 Fed. Reg. 11595 (July 18, 1970). These guidelines, which apply to the School District, are set forth at pp. 1a-3a of the Appendix attached to the instant Brief.

[103]*Ibid.*

national origin-minority groups," in violation of Title VI.[104]

Like the earlier HEW regulations, these 1970 rules require "*affirmative steps* [by the School District] to rectify the language deficiency in order to open [the District's] instructional program to these students."[105] Yet, as this Brief has amply demonstrated, the School District has taken no steps – affirmative or otherwise – to eliminate the discriminatory treatment to which non-English-speaking Chinese students are subjected. Despite this uncontested proof of the School District's violation of the Civil Rights Act of 1964, however, the Ninth Circuit's decision only mentioned this Act in a footnote.[106] Without the benefit of discussion, reasoning, or support, the Court below simply stated that

> Our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act.[107]

Such a disposition by the Ninth Circuit not only reflects a cavalier and summary dismissal of important federal statutory claims, but fails to accord federal administrative regulations "the great weight" to which they are "entitled."[108] Such great weight is especially

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[104] *Ibid.*

[105] *Ibid.* (emphasis added).

[106] *Lau v. Nichols*, 472 F.2d 909, 912, n.6 (App. 120-121).

[107] *Ibid.* In view of this cursory treatment, the Court of Appeals below never discussed or considered the numerous HEW regulations and guidelines discussed in the text accompanying notes 99-105, *supra.*

[108] *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

accorded to regulations issued by HEW, since it is the administrative agency charged with enforcement of the Civil Rights Act of 1964 in the area of education.[109] Under HEW's regulations and guidelines, then, the School District is in clear violation of the Civil Rights Act. Thus, the School District has unlawfully failed to follow the Congressional mandate to take effective "affirmative steps"[110] to remove the barriers that block non-English-speaking Chinese students from receiving their right to educational opportunities.

CONCLUSION

In a case involving another form of educational discrimination, this Court, through Mr. Chief Justice Burger, recently stated that

> There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated. . . .[111]

In the instant case, the "educational message" communicated to thousands of non-English-speaking Chinese students is one of discrimination and exclusion, of official neglect and rejection, of total non-participation in the life of the classroom. For the School District to provide non-English-speaking students with instruction

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[109] *E.g., United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (1967), *cert. denied sub nom., Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

[110] 35 Fed. Reg. 11595 (July 18, 1970).

[111] *Norwood v. Harrison*, 93 S.Ct. 2804, 2812 (1973).

only in a strange tongue reduces the educational experience to mere detention of petitioners for an appointed number of hours each day, in a classroom from which no educational benefits can be derived. In view of its purpose of providing children with an education, the School District's "program" for petitioners is a "self-defeating notion"[112] that tragically serves to "spite its own articulated goals,"[113] as well as violates Constitutional and statutory mandates. Unless this Court reverses the judgment of the Ninth Circuit Court of Appeals, such "spite" will continue, with the consequences – educational, economic, social and cultural – being directly borne by thousands of non-English-speaking Chinese youngsters.

Therefore, for the foregoing reasons, petitioners respectfully request that the judgment of the Ninth Circuit Court of Appeals below be reversed and that the School District be directed to alleviate promptly the

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[112] *United States v. Louisiana*, 265 F.Supp. 703, 708 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967). The complete sentence from which the quoted words come is set forth in note 14, *supra*.

[113] *Stanley v. Illinois*, 405 U.S. 645, 653 (1972).

discrimination which is caused by foreclosing any educational opportunity to non-English-speaking children.

Respectfully submitted,

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Dated: July 25, 1973. *Attorneys for Petitioners*

United States Department of Health, Education and Welfare

Office for Civil Rights

IDENTIFICATION OF DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF NATIONAL ORIGIN

The following memorandum has been sent by the Director, Office for Civil Rights, to selected school districts with students of National Origin-Minority Groups:

Title VI of the Civil Rights Act of 1964, and the Departmental Regulation (45 CFR Part 80) promulgated thereunder, require that there be no discrimination on the basis of race, color, or national origin in the operation of any federally assisted programs.

Title VI compliance review conducted in school districts with large Spanish-surnamed student populations by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils. Similar practices which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese.

The purpose of this memorandum is to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English language skills. The following are some of the major areas of concern that relate to compliance with Title VI:

(1) Where inability to speak and understand the English language excludes national origin-minority group children

from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

(2) School districts must not assign national origin-minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national origin-minority group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(3) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.

(4) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

School districts should examine current practices which exist in their districts in order to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately communicate in writing with the Office for Civil Rights and indicate what steps are to be taken to remedy the situation. Where compliance questions arise as to the sufficiency of programs designed to meet the language skill needs of national origin-minority group children already operating in a particular area, full

information regarding such programs should be provided. In the area of special language assistance, the scope of the program and the process for identifying need and the extent to which the need is fulfilled should be set forth.

School districts which receive this memorandum will be contacted shortly regarding the availability of technical assistance and will be provided with any additional information that may be needed to assist districts in achieving compliance with the law and equal educational opportunity for all children. Effective as of this date the aforementioned areas of concern will be regarded by regional Office for Civil Rights personnel as a part of their compliance responsibilities.

Dated: July 10, 1970

[SEAL] J. STANLEY POTTINGER,
Director,
Office for Civil Rights.

[F.R. Doc. 70-9266; Filed, July 17, 1970
8:45 a.m.]

35 Fed. Reg. 11595
(July 18, 1970)

ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE REGULATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

SAN FRANCISCO UNIFIED SCHOOL DISTRICT (hereinafter called the "Applicant")
(Name of Applicant)

HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated January 20, 1965 San Francisco Unified School District
(Applicant)

By Harold Braun
(President, Chairman of board, or comparable authorized official)

135 Van Ness Avenue
(Applicant's mailing address)
San Francisco, California

HEW-441
(1-64)

GPO 883-133

5a

RECORD OF RECEIPT OF AND ACTION ON CIVIL RIGHTS ASSURANCES
Division of School Assistance
in Federally Affected Areas

LOCAL DISTRICT (Legal name, city, county, State)	APPLICATION NUMBER	
San Francisco Unified School District San Francisco San Francisco County California	- E - 128	- C - 246

[x] 1. Receipt of HEW 441 dated..... January 20, 1965

[x] 2. HEW 441 determined acceptable by SAFA Dan C. Tuason
(Signature)

[x] 3. HEW 441 transmitted to EEOP for files...(date) February 8, 1965

[ ] 4A. Notification received from Equal Educational Opportunities Program that Assurance or Plan (shown below) has been accepted and the Federal payment may be released.....(date) _____

B. HEW 441	Court Order	Desegregation Plan
[ ]	[ ]	[ ]

C. Office of Education identification no..... _____

cc:
P.L. 815 file
P.L. 874 file
Financial folder
Statistical Record file

OE 4268 (1/65)